

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs September 28, 2004

STATE OF TENNESSEE v. JASON ALVIN AULT

Direct Appeal from the Criminal Court for Knox County
No. 74759 Ray L. Jenkins, Judge

No. E2003-02726-CCA-R3-CD - Filed February 8, 2005

The Defendant, Jason Alvin Ault, pled guilty to reckless aggravated assault, a Class D felony. See Tenn. Code Ann. § 39-13-102(d)(1). The Defendant agreed to a sentence of four years with the manner of service left to the trial court's determination. After a sentencing hearing, the trial court ordered the Defendant to serve his sentence in the Department of Correction. The Defendant now appeals, contending that he should have been granted an alternative sentence. We reverse the trial court's order mandating that the sentence be served in confinement and remand this matter for further findings.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Reversed;
Case Remanded**

DAVID H. WELLES, J., delivered the opinion of the court, in which JOSEPH M. TIPTON and JOHN EVERETT WILLIAMS, JJ., joined.

Mark Stephens, Public Defender, and Anna Friedberg, Assistant Public Defender, Knoxville, Tennessee, for the appellant, Jason Alvin Ault.

Paul G. Summers, Attorney General and Reporter; Renee W. Turner, Assistant Attorney General; Randall E. Nichols, District Attorney General; and William Wallace, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The Defendant was arrested in November 2001 after he fired a handgun, shooting victim Nicholas Roberts once in the chest. The incident occurred while the Defendant was walking along a highway and the victim was driving by. The Defendant subsequently pled guilty to reckless aggravated assault. At the plea hearing, the prosecutor stated that the State's witnesses would have testified as follows:

The testimony would be that on the date in question, the defendant's vehicle had broken down on I-640 here in Knox County. He was in the process of walking off of the interstate when he discharged a firearm at a pickup truck that was being driven by the victim in this case, Mr. Nicholas Roberts.

Mr. Roberts went off the interstate at Western Avenue, went into a Krystal's at 3910 Western Avenue where EMS was called to assist on a gunshot wound to his chest.

The defendant also went into that restaurant for a short period of time.

The--the victim was able to identify him and describe him to the police. The police saw the defendant in the area sitting on a curb, took him into custody.

The officers that responded spoke with the victim in the case at the hospital. He again described the suspect.

The officers then went to interview the suspect, which he signed a rights waiver. He gave a statement admitting that he left--that he left his vehicle on the side of the road after it broke down, that he had in his possession a 9mm Beretta with a laser sight. He admitted that he discharged the gun in the direction of the--a gray truck, which was the same truck that the--a gray Toyota truck that the victim was driving in the case.

The Defendant described the offense in the presentence report as follows:

Got in a fight after work. We had been drinking and had took some pills. Me and a guy got in a fight. I went home got my gun. I was going back to my my [sic] car ran out of gas. I was walking across the interstate and had to jump over barriers and my gun went off.

The presentence report indicates that the Defendant was arrested in September 2001 for casual exchange and driving while his license was suspended, both charges being dismissed upon his payment of costs. In 1998, the Defendant was arrested for casual exchange, public intoxication and resisting arrest. These charges were dismissed after the Defendant completed judicial diversion. The Defendant has no prior convictions. At the time of sentencing, the Defendant was twenty-three years old, married, had one three-year-old child and another expected, and was employed full-time. The Defendant has a significant employment history and obtained his GED after dropping out of high school in the eleventh grade. The Defendant admitted to the officer preparing the presentence report that he had a history of substance abuse including alcohol, marijuana and Valium. He admitted to being under the influence of alcohol and Valium at the time he shot the victim. The Defendant stated that he had not used any substances since his arrest, approximately two years prior to the report. The probation officer preparing the presentence report opined that the Defendant "should be considered a medium risk candidate for probation" At the original sentencing hearing, the State did not seek confinement and did not oppose the Defendant's request for probation.

The victim-impact statement reveals that the bullet with which the victim was shot remains lodged in the victim's chest near an artery. The statement makes clear that the victim has suffered devastating personal and financial consequences as a result of his injury. The statement also contains the following handwritten notation by the victim: "Do not allow probation. The least he can do is pay for this with jail time! This was not an accident and he pled guilty and admitted to police he did this because he was mad!"

In ordering the manner of service of the Defendant's sentence, the trial court found as follows:

The Court has had the benefit of the presentence investigation, along with the victim-impact statement attached to the presentence investigation. Usually, these are recitations of vengeance. I've seen one or two victim-impact statements that made sense, and this is one of them.

It appears to the Court, even though it could not be proven by the State, that this is another combat on the interstate, which has become all too common. The explanation offered by the defendant could not, in the Court's opinion, have caused the injury inflicted.

The Court has considered the defendant's interest, behavioral record, employment history, social history, present condition, including physical and mental, interest of the public, the need of deterrence of the kind of crime which the defendant has committed, the defendant's apparent failure to accept the responsibility for his wrong, all of which require the imprisonment of the defendant for his own best interest and especially for the protection of the public.

Enter judgment. Probation is denied.

The Defendant subsequently filed a motion to reconsider and the trial court granted a hearing. At the hearing, the Defendant submitted three letters on his behalf. One letter was from his wife's grandfather, stating in part that the Defendant "has expressed deep remorse and this experience has resulted in rapid maturity for him." The writer asked that the Defendant be sentenced to some alternative to jail so as to be "allowed to work [and] continue to be a productive citizen and take care of his family, as well as meet his responsibilities for his crime." The second letter was written by the Defendant's pastor. The author notes that "[s]ince the incident happened I've seen him married, converted to Christianity, and baptized." The author sought "leniency for the sake of his wife and children." The third letter was from the Defendant's employer, and states that since his hire, the Defendant "has shown potential to be a lead man. [The Defendant] is always on time and has not missed any days without an excused absence. He has been promoted several times, this last time becoming a supervisor." After hearing argument from both the State and defense counsel, the trial court denied the Defendant's motion, letting the earlier order of incarceration stand.

The Defendant now asks this Court to reverse the trial court's denial of an alternative sentence.

Before a trial court imposes a sentence upon a convicted criminal defendant, it must consider (a) the evidence adduced at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) evidence and information offered by the parties on the enhancement and mitigating factors set forth in Tennessee Code Annotated sections 40-35-113 and 40-35-114; and (f) any statement the defendant wishes to make in the defendant's own behalf about sentencing. See Tenn. Code Ann. § 40-35-210(b); State v. Imfeld, 70 S.W.3d 698, 704 (Tenn. 2002). To facilitate appellate review, the trial court is required to place on the record its reasons for imposing the specific sentence, including the identification of the mitigating and enhancement factors found, the specific facts supporting each enhancement factor found, and the method by which the mitigating and enhancement factors have been evaluated and balanced in determining the sentence. See State v. Samuels, 44 S.W.3d 489, 492 (Tenn. 2001).

Upon a challenge to the sentence imposed, this court has a duty to conduct a de novo review of the sentence with a presumption that the determinations made by the trial court are correct. See Tenn. Code Ann. § 40-35-401(d). However, this presumption “is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances.” State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). If our review reflects that the trial court followed the statutory sentencing procedure, that the court imposed a lawful sentence after having given due consideration and proper weight to the factors and principles set out under the sentencing law, and that the trial court's findings of fact are adequately supported by the record, then the presumption is applicable, and we may not modify the sentence even if we would have preferred a different result. See State v. Pike, 978 S.W.2d 904, 926-27 (Tenn. 1998). We will uphold the sentence imposed by the trial court if (1) the sentence complies with the purposes and principles of the 1989 Sentencing Act, and (2) the trial court's findings are adequately supported by the record. See State v. Arnett, 49 S.W.3d 250, 257 (Tenn. 2001). The burden of showing that a sentence is improper is upon the appealing party. See Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments; Arnett, 49 S.W.3d at 257.

A defendant who does not possess a criminal history showing a clear disregard for society's laws and morals, who has not failed past rehabilitation efforts, and who “is an especially mitigated or standard offender convicted of a Class C, D, or E felony is presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary.” Tenn. Code Ann. § 40-35-102(6); see also State v. Fields, 40 S.W.3d 435, 440 (Tenn. 2001). The following considerations provide guidance regarding what constitutes “evidence to the contrary” which would rebut the presumption of alternative sentencing:

- (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
- (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or

(C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant[.]

Tenn. Code Ann. § 40-35-103(1); see also State v. Hooper, 29 S.W.3d 1, 5 (Tenn. 2000).

Additionally, the principles of sentencing reflect that the sentence should be no greater than that deserved for the offense committed and should be the least severe measure necessary to achieve the purposes for which the sentence is imposed. See Tenn. Code Ann. § 40-35-103(2), (4). The court should also consider the defendant's potential for rehabilitation or treatment in determining the appropriate sentence. See id. § 40-35-103(5).

The Defendant was convicted of a Class D felony and sentenced as a standard offender. Accordingly, he is "presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary." Tenn. Code Ann. § 40-35-102(6). In this case, however, the trial court failed to acknowledge the Defendant's presumptive entitlement to an alternative sentence. Nor did the trial court set forth on the record the evidence which rebutted the presumption, or discuss which of the three above criteria existed so as to make confinement necessary. Rather, the trial court opined that "[t]he explanation offered by the [D]efendant [about how the shooting occurred] could not . . . have caused the injury inflicted." The court determined that, rather than being accidental as claimed by the Defendant, the shooting was "another combat on the interstate." The court further noted that incidents of highway "combat" have "become all too common." Accordingly, the court determined that the Defendant should serve his sentence in confinement "especially for the protection of the public." The court further expressed a concern with the Defendant's "apparent failure to accept the responsibility for his wrong."

These findings by the trial court all rest on the trial court's conclusion that the Defendant shot his handgun deliberately rather than accidentally, and then lied about the circumstances of the shooting to the probation officer preparing the presentence report. However, the trial court acknowledged that the circumstances surrounding the actual discharge of the gun "could not be proven by the State." The trial judge did not refer to any of the facts recited at the guilty plea hearing that would support his conclusion. Accordingly, the trial judge's opinion about how and why the gun was fired appears to be based on facts not found in the record. Indeed, at the original sentencing hearing, the prosecutor stated, "how it happened, really we -- we don't know exactly, I mean, if -- if he, you know, took dead aim at the car and shot or if it was a -- just a reckless drunken rage shooting or if it was an accident as [the Defendant] submits."

Nevertheless, this Court has serious concerns about the nature of the offense: the Defendant was carrying a loaded handgun while under the influence of alcohol and Valium. The Defendant's conduct resulted in severe bodily injury to a passing motorist who happened to be in the wrong place at the wrong time. The Defendant's recklessness almost cost the victim his life. The Defendant had already had several brushes with the law, and suffered lenient consequences for those prior infractions. The probation officer evaluated the Defendant to be a "medium" risk for probation. On

this record, this Court is not prepared to overturn the trial court's ruling and grant the Defendant full probation.

The trial court erred in failing to set forth on the record the reasons for its determination that the Defendant is not entitled to an alternative sentence. The record before this Court is not sufficient to make that determination for itself. Accordingly, we remand this matter for further findings by the trial court with regard to the Defendant's statutory presumptive entitlement to an alternative sentence, on what basis that presumption is overcome, and for what reason(s) confinement is necessary.

We reverse the judgment of the trial court ordering the Defendant to serve his sentence in the Department of Correction and remand this matter for further findings consistent with this opinion. We further point out to the trial court that the Judgment reflecting the Defendant's conviction of reckless aggravated assault incorrectly designates the offense as a Class E felony. In conjunction with the remand of this matter, the trial court should correct the Judgment to accurately reflect that the Defendant's conviction offense is a Class D felony.

DAVID H. WELLES, JUDGE